Litigation Lessons from the American Civil War and Other Lesser Conflicts

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Litigation Strategies

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LITIGATION LESSONS FROM THE AMERICAN CIVIL WAR AND OTHER LESSER CONFLICTS

In all of the vast literature and varied perspectives on the subject of the American Civil War\(^1\) there is one point of general agreement. The ultimate turning point in the conflict was the promotion of Ulysses Grant to the role of supreme commander of the Union forces in March 1864.

The war was then three years old. It had spread from the token shelling of Fort Sumter in April 1861 to engulf most of the country. Roughly four hundred thousand soldiers had already died. The North held an enormous edge in population and industrial capacity yet it had been unable to drive home those advantages. The victory at Gettysburg in the east had staved off the North’s defeat. The capture of Vicksburg in the west split the South, boosted Northern morale, and proved Grant to be the North’s most effective military leader. But the Union lacked a comprehensive strategy to bring the war to a successful end.

With Grant’s elevation to overall command, the North’s superior resources were at last joined with a strategic vision of how those resources should be used. In the west, the Union faced a Confederate army led by one of the South’s most senior generals, Joe Johnston. In the east it was General Robert Lee who stood at the head of the Southern forces. Grant’s plan for victory was later summed by his second in command, General Sherman, in a sentence: “I would go for Johnston; Grant would go for Lee.” As for the roles of other northern commanders, President Lincoln added a memorable addendum: “Those not skinning can hold a leg.”

In executing this plan it was Grant who had the more difficult task. Lee was a masterful military tactician. In the past he had repeatedly overcome larger Union armies through careful planning and bold execution. But in Grant he met his equal. Grant’s objective was simple – to draw Lee into a decisive battle by threatening the Confederate capital of Richmond. He would try and maneuver his army between Lee and Richmond, forcing Lee to attack.

Over the course of the following two months Grant and Lee fought four major battles as Grant attempted to outflank Lee and get between him and his capital. Each time Lee fended off Grant, the northern leader moved further south to a new position and tried again. The result of some of those battles was at best a draw, and one was a clear defeat for the North, but Grant never lost sight of his objective. Unlike some of his Union predecessors he did not postpone action until conditions were perfect, he did not rest on his laurels when successful, he did not allow setbacks to unnerve him or force him into retreat, and he maintained the initiative. Grant kept moving forward.

\(^1\) So much has been written that there are bookstores all over the United States selling nothing but books on the Civil War. The Abraham Lincoln book store in Chicago is an excellent example: alincolnbookshop.com
Grant never did succeed in getting between Lee and Richmond. Instead, his two-month campaign ended in a siege of Lee’s army at Petersburg, just south of Confederate capital. But the result was the same. The siege lasted nine months until Grant’s forces, capitalizing on a failed attempt by the South to break out, closed the ring on the two southern cities. With Sherman (who had overwhelmed Johnston with his famous march to the sea) now also closing in Confederate President Jefferson Davis abandoned Richmond. On April 3, 1865, the capital of the South fell to the Union and the following day, barely 48 hours after Davis fled, President Lincoln sat in Davis’ office in the White House of the Confederacy. The North’s victory was assured. A week later, Lee surrendered to Grant at the Appomattox Courthouse.

Litigation, thankfully, is not war. The goal is securing the best possible outcome for your client – not the destruction of your opponent. But as the foregoing shows there are lessons to be learned from that ultimate mode of dispute resolution: know what your objective is, make a plan to achieve that objective compatible with your resources, be proactive, take the initiative to move your plan forward, pay attention to the details but don’t get lost in them, adjust your plans when necessary but don’t lose sight of your objective. Be realistic. Sometimes you’re Grant and you’ll achieve your goal. Sometimes you’re Lee and you can’t win no matter how well you fight. When that happens negotiate the best surrender possible. With that introduction, this paper will briefly discuss some examples of the kinds of battles you may find yourself in and some strategic approaches that may be helpful.

THE PAPER WAR

Sometimes the sheer volume of relevant records is one of the defining features of a litigation file. Some such paper wars also involve a blizzard of motions and procedural steps. Sometimes the volume of records is unavoidable due to the nature of the case. Aboriginal litigation is an example. The events relevant to some cases may span decades, even centuries. The records may start in handwriting because the typewriter was not yet in common use and end in emails or tweets. In some cases the volume of records may, to a degree at least, be tactical. To overwhelm the other side with so much detail they lose sight of the forest. Whatever the reason for the volume, how do you keep from getting lost in the woods?